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IN THE COURT OF APPEALS OF INDIANA

JOHN DEAN JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0610-CR-439
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDEBURGH SUPERIOR COURT
The Honorable Wayne S. Trockman, Judge
Cause No. 82D02-0403-FC-261 and 82D02-0408-MR-629

August 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Under two separate cause numbers, John Dean, Jr. pled guilty to Burglary Causing Serious Bodily Injury,[1] a class A felony, Voluntary Manslaughter,[2] a class B felony, Burglary,[3] a class C felony, and Theft,[4] a class D felony. Dean presents the following restated issues for review:[5]

1. Did the trial court err in relying upon alcohol-related misdemeanor convictions in enhancing Dean's felony sentence?

2. Did the trial court violate *Blakely v. Washington* in sentencing Dean?

We reverse and remand.

The facts are that on August 20, 2004, Dean broke into the home of seventy-four-year-old Lloyd Goad, beat him, took his wallet and car keys, and fled the scene in Goad's car. Goad died less than three weeks later. Dean was apprehended a short time later when he was involved in a drunk-driving accident in Illinois while driving Goad's car. On November 1, 2004, Dean broke into the home of Bambi Boyle and exerted unauthorized control over several of Boyle's possessions.

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[1] Ind. Code Ann. § 35-43-2-1(2)(B) (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

[2] Ind. Code Ann. § 35-42-1-3(a)(1) (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

[3] I.C. § 35-43-2-1.

[4] I.C. § 35-43-4-2(a) (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

[5] Because of our resolution of Issue 2, we do not address a third issue presented by Dean regarding the appropriateness of the sentence imposed by the trial court.

In connection with the first incident, Dean was charged under cause number 82D02-0403-MR-629 (Cause 629) with burglary and robbery, both as class A felonies, and murder. In connection with the second incident, he was charged under Cause No. 82D02-0403-FC-261 (Cause 261) with burglary as a class C felony and theft as a class D felony. On July 3, 2006, Dean entered a guilty plea agreement calling for him to plead guilty to the offenses charged in Cause 261, and to plead guilty to burglary causing serious bodily injury and the lesser included offense of voluntary manslaughter in Cause 629. In exchange, the State agreed to dismiss the robbery and murder charges under Cause 629, and to dismiss other charges under an unrelated third cause number. With respect to sentencing, the parties agreed the two sentences under Cause 629 would run concurrent with each other, and the aggregate sentence under Cause 261 would run consecutive to the aggregate sentence under Cause 629. The sentences for each of the individual convictions were left to the court's discretion. Following a hearing, the court imposed an aggregate five-year sentence (two years and five years, concurrent) under Cause 261, and an aggregate forty-five-year sentence under Cause 629 (fifteen years and forty-five years, concurrent), and ran the two aggregate sentences consecutively, for a total sentence of fifty years.

In enhancing Dean's sentence, the court cited three aggravating circumstances: (1) Dean's criminal history, (2) Dean was on probation or out on bond at the time these offenses were committed, and (3) the physical infirmity of the victim. Dean challenges each of the aggravators. We will consider each contention in turn.

1.

Dean notes his criminal history consisted of only two alcohol-related misdemeanor offenses in the preceding ten years. Citing *Neale v. State*, 826 N.E.2d 635 (Ind. 2005) and *Wooley v. State*, 716 N.E.2d 919 (Ind. 1999), Dean contends the trial court erred in relying upon this criminal history to enhance a felony sentence. According to Dean, "These convictions are 'at best marginally significant as aggravating circumstances' in considering a sentence for a Class A felony." *Appellant's Brief* at 9.

In *Ruiz v. State*, 818 N.E.2d 927 (Ind. 2004), the Supreme Court observed that the significance of prior alcohol-related misdemeanor offenses at sentencing "'varies based on the gravity, nature and number of prior offenses as they relate to the current offense.'" *Id*. at 929 (quoting *Wooley v. State*, 716 N.E.2d at 929). According to the presentence investigation report, Dean's criminal history consisted of three misdemeanor convictions for operating a vehicle while intoxicated, four misdemeanor counts for public intoxication, one class C misdemeanor conviction for furnishing alcohol to a minor, and two convictions for battery, one as a class A misdemeanor and one as a class B misdemeanor. Of the eight substance-abuse convictions, five occurred ten years or more before the instant offense. Dean contends such remoteness in time and relative severity render them inappropriate to enhance the sentence for the instant offense. To the contrary, the number and nature of those offenses indicates they are relevant to that determination.

At the sentencing hearing, Dean admitted that he committed the instant offenses as a direct result of his substance abuse (both alcohol and otherwise), viz., "I'm not a criminal. I'm an addict and the only reason that everything happened was because I ran out of money and I couldn't get no more beer or anymore pills or anything." *Appellant's Appendix* at 168. Although the individual convictions are relatively minor, in the aggregate, they are both significant and relevant. This is especially true considering the nature of the prior offenses in juxtaposition with the admitted reason for the attack upon Goad, the prior convictions are relevant. The trial court did not err in enhancing Dean's sentence based upon his criminal history.

2.

Dean contends the trial court violated *Blakely v. Washington* in sentencing him. On April 25, 2005, the General Assembly responded to *Blakely v. Washington*, 542 U.S. 296 (2004), by amending Indiana's sentencing statutes. Recently, our Supreme Court clarified that the statutes governing a sentence are those that were in effect at the time the crime was committed. *Gutermuth v. State*, 868 N.E.2d 427 (Ind. 2007). We note here that Dean challenges only the enhancement of his sentence for burglary causing serious bodily injury. Thus, he does not dispute the validity of the enhanced sentence he received for the convictions stemming from the November 1 incident at Boyle's residence. Accordingly, we will confine our analysis to the enhanced sentence for burglary causing serious bodily injury.

As observed previously, the former version of the sentencing statute governs Dean's sentence. As a result, the trial court's actions herein implicate *Blakely* concerns. Pursuant to *Blakely*, juries, not judges, must find beyond a reasonable doubt "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Blakely v. Washington*, 542 U.S. at 301. Our Supreme Court has observed, however, that "*Blakely* and the later case *United States v. Booker*[, 543 U.S. 220 (2005)], indicate that there are at least four ways that meet the procedural requirements of the Sixth Amendment in which such facts can be found and used by a court in enhancing a sentence." *Mask v. State*, 829 N.E.2d 932, 936 (Ind. 2005). Specifically, (1) a jury finding, (2) a prior conviction, (3) an admission by a defendant, and (4) a defendant's consent to judicial fact-finding are proper ways to enhance a sentence under *Blakely*. *Johnson v. State*, 830 N.E.2d 895 (Ind. 2005).

Dean claims the trial court here violated *Blakely* in that the court found as aggravators that Dean was on bond or probation at the time he committed these offenses and the victim's physical infirmity. Dean notes these aggravators were neither admitted by him nor proved in a manner proper under *Blakely*, and thus in violation thereof. In *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005), *cert. denied*, our Supreme Court held that a finding that the defendant was on bond or probation at the time the instant offense was committed is a proper aggravating circumstance under *Blakely* if the finding is based upon information provided in the presentence investigation report (PSI). In this case, the PSI reflected that Dean was out on bond or probation for possession of a controlled

substance as a class D felony, under cause number 82D0401FD00040, at the time the instant offense was committed. This aggravator did not violate *Blakely*.

Dean's final challenge to the aggravating circumstances is valid: the aggravator concerning the infirmity of the victim was not admitted by Dean, found by a jury, or the product of consensual judicial fact-finding. It therefore violated *Blakely*. This court has on many occasions been confronted with a situation in which some aggravating circumstances have been deemed invalid under *Blakely*, but other valid aggravators remain. We have explained our options upon review in that circumstance:

> Even one valid aggravating circumstance is sufficient to support an enhancement of a sentence. When the sentencing court improperly applies an aggravating circumstance but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. This occurs when the invalid aggravator played a relatively unimportant role in the trial court's decision, and other aggravating circumstances were sufficient to sustain the trial court's decision. When a reviewing court "can identify sufficient aggravating circumstances to persuade it that the trial court would have entered the same sentence even absent the impermissible factor, it should affirm the trial court's decision." When a reviewing court "cannot say with confidence that the permissible aggravators would have led to the same result, it should remand for re-sentencing by the trial court or correct the sentencing on appeal."

Means v. State, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004), *trans. denied* (citations omitted).

The trial court's sentencing statement is not detailed enough to shed light on the court's reasoning in enhancing Dean's sentence as it did. The court merely listed the three aggravators (on probation, criminal history, and infirmity of the victim) and the

mitigator (guilty plea) and pronounced sentence. It strikes us that the victim's relative helplessness may have been a significant consideration. In any event, we are unable to say with confidence that considering only the proper aggravators, the trial court would have imposed the same sentence.

Accordingly, we reverse the enhanced sentence imposed for burglary causing serious bodily injury and remand for a new sentencing hearing at which the State may seek to prove adequate aggravating circumstances before a jury or accept the standard terms. *Baber v. State*, 842 N.E.2d 343 (Ind. 2006), *cert. denied*. "As a third option, the State may elect to forgo the empanelling of a jury and stipulate to [Dean's] being resentenced by the trial court only in light of the aggravating factors for which a jury determination is unnecessary...." *Id*. at 345 (quoting *Patrick v. State*, 827 N.E.2d 30, 31 (Ind. 2005)).

Judgment reversed and remanded.

BAKER, C.J., and CRONE, J., concur.